

Title	Interlocutory Appeals of Bifurcated Issues in Family Law Cases (amend Cal. Rules of Court, rule 1269.5)
Summary	Rule 1269.5 provides a procedure for interlocutory appeals from decisions of certain bifurcated issues in family law cases. The proposed amendment makes clear that a party's failure to avail itself of these procedures does not preclude appeal on the bifurcated issues after a final judgment.
Source	Appellate Advisory Committee Family and Juvenile Law Advisory Committee
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Discussion	<p>Rule 1269.5 provides a procedure for interlocutory appeals from decisions of certain bifurcated issues in family law cases. Appellate jurisdiction is discretionary—before the appeal can proceed, the trial court, either on its own or on a party's motion, must certify the issue for immediate appellate review and a party must then successfully move to appeal in the Court of Appeal. The rule is not clear, however, whether a party's failure to avail itself of this procedure effects a waiver of any rights to appellate review. (A copy of the entire current rule 1269.5 is attached at pp. 4-6.)</p> <p>The rule currently provides in subdivision (g) that the trial court's denial of certification does not preclude review of a decision on a bifurcated issue by extraordinary writ or on appeal from the final judgment, nor does the Court of Appeal's denial of a motion to appeal preclude review on appeal from the final judgment. But the rule is silent on the effect of a party's failure to move in the trial court for certification of probable cause for immediate appellate review of an order or to move to appeal in the Court of Appeal.</p> <p>In light of this silence, one practice book suggests making those motions to avoid the possibility of waiver. (Eisenberg et al., <i>Cal. Practice Guide: Civil Appeals and Writs</i> (The Rutter Group 2000) ¶ 2:59, pp. 2-31 ["pending a definitive resolution of this issue by the courts, counsel should consider requesting certification on any significant unfavorable bifurcated issue ruling in a marital status case (and, if certification is granted, following up with a timely motion to</p>

appeal)”..)

To eliminate this uncertainty and unnecessary motions, the Appellate Advisory Committee proposes adding a new subdivision (h) that deals specifically with appeals. The new subdivision would make it clear that a party does not waive its right to later appellate review by failing to move in the trial court for certification for immediate appeal or by failing to move to appeal in the court of appeal.

Subdivision (g) would be applicable only to review by writ. It would clarify that the trial court’s denial of a motion requesting certification of probable cause for immediate appellate review does not preclude review of the bifurcated issue by extraordinary writ.

The text of the amendment is attached at page 3.

Attachments

PROPOSAL

Rule 1269.5 of the California Rules of Court would be amended effective January 1, 2002, to read:

1 **Rule 1269.5. Interlocutory appeals**

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3 **(a)–(f) * * ***

4
5 **(g) [Review by writ ~~or appeal~~] The trial court's denial of a certification**
6 **~~for immediate appeal motion under (b)~~ does not preclude review of the**
7 **decision on the bifurcated issue by extraordinary writ. ~~Neither the trial~~**
8 **~~court's denial of a certification for immediate appeal nor the Court of~~**
9 **~~Appeal's denial of a motion to appeal precludes review of the bifurcated~~**
10 **~~issue upon appeal of the final judgment in the proceeding.~~**

11
12 **(h) [Review by appeal] None of the following precludes review of the**
13 **decision on the bifurcated issue upon appeal of the final judgment:**

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15 **(1) A party's failure to move for certification under (b) for immediate**
16 **appeal;**

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18 **(2) The trial court's denial of a certification motion under (b) for**
19 **immediate appeal;**

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21 **(3) A party's failure to move to appeal under (d); and**

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23 **(4) The Court of Appeal's denial of a motion to appeal under (d).**

CALIFORNIA RULES OF COURT

Current Rules on Bifurcation of Issues (Rules 1269 and 1269.5)

Rule 1269. Bifurcation of issues

(a) [Bifurcation of issues] On noticed motion of a party, the stipulation of the parties, or its own motion, the court may bifurcate one or more issues to be tried separately before other issues are tried. The motion shall be heard not later than the trial-setting conference.

The clerk shall mail copies of the order deciding the bifurcated issue and any statement of decision under rule 232.5 to the parties within 10 days of their filing and file a certificate of mailing.

(b) [When to bifurcate] The court may try separately one or more issues before trial of the other issues if resolution of the bifurcated issue is likely to simplify the determination of the other issues. Issues that may, in some cases, be appropriate to try separately in advance include:

- (1) validity of a postnuptial or premarital agreement;
- (2) date of separation;
- (3) date to use for valuation of assets;
- (4) whether property is separate or community;
- (5) how to apportion increase in value of a business;
- (6) existence or value of business or professional goodwill.

Rule 1269.5. Interlocutory appeals

(a) [Applicability] This rule does not apply to appeals from the court's termination of marital status as a separate issue, nor to appeals from other orders that are separately appealable.

(b) [Certificate of probable cause for appeal] The order deciding the bifurcated issue may, at the judge's discretion, include an order certifying there is probable cause for immediate appellate review of the issue. If it was not in the order, within 10 days after the clerk mails the order deciding the bifurcated issue a party may notice a motion requesting the court to certify there is probable cause for immediate appellate review of the order. The motion shall be heard within 30 days after the order deciding the bifurcated issue is mailed.

The clerk shall promptly mail notice of the decision on the motion to the parties. If the motion is not determined within 40 days after mailing of the order on the bifurcated issue, it shall be deemed granted on the grounds stated in the motion.

(c) [Content and effect of certificate] A certificate of probable cause shall state, in general terms, the reason immediate appellate review is desirable, such as a statement that final resolution of the issue

- (1) is likely to lead to settlement of the entire case;
- (2) will simplify remaining issues;
- (3) will conserve the courts' resources;
- (4) will benefit the well-being of a child of the marriage or the parties.

If a certificate is granted, trial of the remaining issues may be stayed. If trial of the remaining issues is stayed, unless otherwise ordered by the trial court on noticed motion, further discovery shall be stayed while the certification is pending. These stays terminate upon the expiration of time for filing a motion to appeal if none is filed, or upon the Court of Appeal denying all motions to appeal, or upon the Court of Appeal decision becoming final.

(d) [Motion to appeal] If the certificate is granted, a party may within 15 days after the mailing of the notice of the order granting it serve and file in the Court of Appeal a motion to appeal the decision on the bifurcated issue. On ex parte application served and filed within 15 days, the Court of Appeal or the trial court may extend the time for filing the motion to appeal by not more than an additional 20 days. The motion shall contain a brief statement of the facts necessary to an understanding of the issue; a statement of the issue; and a statement of why, in the context of the case, an immediate appeal is desirable. The motion shall include or have annexed a copy of the decision of the trial court on the bifurcated issue; any statement of decision; the certification of the appeal; and a sufficient partial record to enable the Court of Appeal to determine whether to grant the motion. A summary of evidence and oral proceedings, if relevant, supported by a declaration of counsel may be used when a transcript is not available. The motion shall be accompanied by the filing fee for an appeal under rule 1(c) and Government Code sections 68926 and 68926.1. A copy of the motion shall be served on the trial court.

(e) [Proceedings to determine motion] Within 10 days after service of the motion, an adverse party may serve and file an opposition to it. The motion to appeal and any opposition shall be submitted without oral argument, unless otherwise ordered.

The motion to appeal shall be deemed granted unless it is denied within 30 days from the date of filing the opposition or the last document requested by the court, whichever is later. Denial of a motion to appeal is final forthwith and is not subject to rehearing. A party aggrieved by the denial of the motion may petition for review by the Supreme Court.

(f) [Proceedings if motion to appeal is granted] If the motion to appeal is granted, the moving party is deemed an appellant, and the rules governing other civil appeals apply except as provided in this rule. The partial record filed with the motion shall be considered the record for the appeal unless, within 10 days from the date notice of the grant of the motion is mailed, a party notifies the Court of Appeal of additional portions of the record that are needed for a full consideration of the appeal. If a party notifies the court of the need for an additional record, the additional material shall be secured from the trial court by augmentation under rule 12, unless it appears to the Court of Appeal that some of the material is not needed.

Briefs shall be filed pursuant to a schedule set for the matter by the Court of Appeal.

(g) [Review by writ or appeal] The trial court's denial of a certification for immediate appeal does not preclude review of the decision on the bifurcated issue by extraordinary writ. Neither the trial court's denial of a certification for immediate appeal nor the Court of Appeal's denial of a motion to appeal precludes review of the bifurcated issue upon appeal of the final judgment in the proceeding.